SUPREME COURT

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IN THE

Supreme Court of the United States

October Term, 1966

No. 3

ROBERT REDRUP,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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Opinions Below

The trial court did not deliver an opinion. The Appellate Term of the New York Supreme Court, First Department, affirmed the conviction on December 17, 1964, without opinion. Leave to appeal to the Court of Appeals was denied on January 4, 1965, by Associate Judge STANLEY H. FULD without opinion.

Statement

On April 29, 1964, an information was filed against Redrup charging him, under Section 1141 of the N. Y. Penal Law, with two counts of selling obscene books, entitled *Lust Pool* and *Shame Agent,* the sale having been made to Patrolman Robert Greifenstein on April 10, 1964 (R.6).* Tried before a three-judge panel, the defendant was found guilty on each count on June 11, 1964 (R.23), and on July 28, 1964, received a suspended sentence (R.24).

On appeal, the Appellate Term of the New York Supreme Court, First Department, affirmed the judgment without opinion (R.27-8), and leave to appeal to the Court of Appeals was denied on January 4, 1965, by Associate Judge STANLEY H. FULD (R.28). Certiorari was allowed by this Court on April 25, 1966, limited to a question concerning *scienter.*

THE EVIDENCE

The People's Case

Robert Greifenstein, a New York City police patrolman, testified that on April 10, 1964, at about 5:50 p.m., he visited a newsstand located on the street level of a subway arcade at 263 West 42nd Street in New York County (R.10). Displayed among the books on the bookrack were two paperback volumes entitled *Lust Pool* and *Shame Agent.* Noticing these, the officer pointed to them and told the salesman, Robert Redrup, "*Lust Pool* and *Shame Agent*" (*id.*). The defendant then removed the two books from their rack and

* References, unless otherwise indicated, are to pages of the Transcript of Record in this Court.

placed them on the counter, while the officer handed Redrup a dollar bill. Redrup, however, told the customer that the books cost $1.80, and Greifenstein replied that he thought they were fifty cents each. The defendant then explained that they cost ninety cents apiece. When the officer pointed out to the salesman that *Shame Agent* had a price of seventy-five cents marked on the cover, Redrup responded, "Okay, give me a dollar sixty-five." The officer then gave him another dollar, and the defendant returned thirty-five cents in change, placed the books in a paper bag and handed it to Greifenstein (R.11).

After the purchase, Greifenstein identified himself as a police officer and showed a search warrant for the premises (*id.*). In response to questions, Redrup stated that he worked for a Mr. Milton Block for two years, earned $75 per week, and his duties alternated between the newsstand where the sale was made and the bookstore downstairs in the subway. While still at the newsstand, the officer asked the defendant, "Why do you sell this garbage?" Redrup answered,

> "'There is worse stuff than that around . . . I think these books here are worse,' and he was referring to girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black-and-white" (R.12).

The Defense

Robert Redrup, 36, the defendant, testified that he was employed by the owner of the newsstand and the arcade bookstore for the past two years, earning $75 per week. For the past eight months he worked in the store downstairs, and for the previous 16 months at the newsstand (R.

14, 17). The store and stand sell "all kinds of paperbacks," but mainly detective stories, westerns, and books similar to *Lust Pool* and *Shame Agent* (R.14, 20-21). On the day of arrest, Redup was at the newsstand for the hour between 5:30 and 6:30 p.m. "because the man was sick" (R.15). Twice previously he had "filled in" for an hour at the newsstand, the last occasion being two weeks before his arrest (R.15, 21).

When Greifenstein asked to buy the books, another clerk at the newsstand took them from the rack and handed them to the defendant. Redrup told the customer the price was $1.80 "because they charge 90 cents apiece for those books." But after some dispute as to the price, one book being marked "75¢," the other clerk told Redrup to "charge what it says," and the defendant accepted $1.65 from the officer (R.15-16, 18-19).

The policeman then identified himself and exhibited a search warrant (R.15). Redrup told the officer that he worked there for an hour on Friday nights, substituting for the sick sales clerk. Redrup did not recall telling the policeman that other books "were worse" than the ones sold, but stated that girlie magazines were sold at the stand. The defendant also testified that he had never seen the two books before the time of sale (R.16), although on cross-examination he answered that "I knew those books were sold there; I could see them" (R.20).

Question Presented

The question certified by this Court in the grant of certiorari, as framed in the petition therefor, is as follows:

Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the State.

POINT I

The constitutional requirement of *scienter* in obscenity prosecutions is satisfied by proof that the defendant knew the facts concerning the contents of the piece in question.

In *Smith* v. *California* [361 U.S. 147 (1959)], this Court held that the Constitution prohibits a state from imposing criminal liability for the sale of obscene materials without proof of the mental element of *scienter*. About three months later, the New York State Court of Appeals, without opinion, reversed a conviction had under Section 1141 of the New York Penal Law. The memorandum accompanying the decision revealed that the reversal was for failure of proof of *scienter* as required by *Smith, supra* [*People* v. *Engel*, 7 N.Y.2d 1002 (1960)]. While New York's high court was not then dealing directly with the

question of the statute's constitutionality, the law was impliedly construed to require proof of *scienter*. One year after *Engel*, the Court of Appeals confronted the question directly. In *People* v. *Finkelstein* [9 N.Y.2d 342, 344 (1961)], the court wrote: "It is our firm opinion, on this our first opportunity to construe the statute, in this respect, that the definition of the crime is instinct with the idea of *scienter*." The constitutionality of Section 1141 was thereby preserved, and ever since the prosecution has borne the burden of proving the mental element of the crime in New York.

In *Smith* this Court expressly reserved for future consideration the question of "what sort of mental element" is meant by the term "*scienter*" as applied to obscenity prosecutions. Notwithstanding the reservation, however, the opinion of Mr. Justice BRENNAN, voicing the Court's decision in *Smith*, defined the term at one point as: "knowledge by appellant of the contents of the book" [361 U.S. at p. 149]. Indeed, throughout the majority and concurring opinions the word "contents" was used interchangeably or in combination with "nature" and "character" to describe the sort of knowledge constitutionally requisite. The question here presented suggests that there can be no valid conviction absent proof that the defendant "believed that the material involved violated the law."

The petitioner's brief is a general treatise on the measure of evidence necessary to satisfy the "strict standards" of proof beyond a reasonable doubt in a First Amendment case. It only touches in passing upon what seems to be the central issue of the case. However, the brief on behalf of the Council for Periodical Distributors Associations,

Inc., *amicus curiae* (hereafter "Distributors"), comes to grips with the troublesome question. Amicus states its proposal in the negative: that criminal liability is removed by a "good faith" and rationally grounded belief that the material is not obscene. But since the burden of proof would rest with the the prosecution to establish the negative of the negative, the proposed *scienter* standard might as well be expressed: the guilty defendant must believe that the material was obscene. The examples supplied (Distributors' brief, p. 7) of proof to satisfy the the amicus' test, convincingly demonstrate the affirmative burden he would impose upon the prosecution. Thus, the Distributors must be read to contend, as the petitioner himself appears to suggest, that the sort of knowledge required by the Constitution is not mere awareness of the operative facts, but cognition of a legal conclusion, indeed, the accurate prediction of the result of possible future litigation: the obscenity of the article. Not traditional usage, nor precedent, nor common sense and good reason accords with the interpretation advanced for the term *scienter*.

In *Rosen* v. *United States* [161 U. S. 29 (1896)] this Court specifically rejected a similar contention addressed to a Federal statute. There the defense requested a trial instruction of acquittal if a reasonable doubt existed that the defendant knew the mailed material to be obscene. In upholding the refusal to charge in this manner the Court, speaking through former Justice HARLAN, declared:

> "The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mails by one who knew or

had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails" [161 U.S. at 41].

Later attempts to interpret *scienter* as requiring knowledge by the defendant of obscenity have similarly failed. The courts consistently, and as recently as 1962, have applied the reasoning of *Rosen* to hold that knowledge or notice of the contents of the challenged work is sufficient.*

In the criminal law generally, the element of *scienter* is established by knowledge of the operable facts. That the

* *Price* v. *United States*, 165 U. S. 311 (1897); *Kahm* v. *United States*, 300 F. 2d 78, 86 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962); *United States* v. *Oakley*, 290 F. 2d 517, 519 (6th Cir. 1961), cert. denied, 368 U. S. 888 (1961); *Schindler* v. *United States*, 208 F. 2d 289 (9th Cir. 1953); *People* v. *Wepplo*, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947); *California* v. *Williamson*, 207 Cal. App. 2d 839, 845 (1962), cert. den. 377 U. S. 994 (1964); *Cincinnati* v. *King*, 168 N. E. 2d 633 (1960).

See also, *People* v. *Finkelstein*, 11 N. Y. 2d 300 (1962), cert. denied 371 U. S. 863 (1962); *State* v. *Hudson County News*, 41 N. J. 247, 196 A. 2d 225 (1963); *Alexander* v. *United States*, 271 F. 2d 140, 145 (8th Cir. 1959); *United States* v. *Hockman*, 277 F. 2d 631, 633 (7th Cir. 1960), cert. denied 364 U. S. 837 (1960); *Wisconsin* v. *Chobot*, 12 Wisc. 2d 110, 106 N. W. 2d 286, 292 (1960), appeal dismissed 368 U. S. 15 (1961); *California* v. *Harris*, 192 Cal. App. 2d 887, 893 (1961), rev'd on other gds., 366 P. 2d 305 (1961); *Connecticut* v. *Andrews*, 150 Conn. 103, 186 A. 2d 546, 552 (1962); *Connecticut* v. *Cercone*, 2 Conn. Cir. 144, 196 A. 2d 439, 444 (1963); *Nebraska* v. *Jungclaus*, 176 Neb. 641, 126 N. W. 2d 858, 862 (1964); *Chicago* v. *Doe*, 47 App. 2d 460, 197 N. E. 2d 711, 715 (1964); *Missouri* v. *Vollmer*, 389 S. W. 2d 20 (1965).

wrongdoer did not know that such facts amounted to a crime at law is neither a defense nor an excuse. And pornography has a purely factual aspect. For there is objectively perceivable material whose contents, subject matter, and treatment are susceptible of inspection. More specifically, a seller may be expected to learn the nature of the "dominant theme." The legal significance of these facts, however, is a far more subtle and complex issue beyond the layman's ordinary capacity to decide, involving "a question of constitutional judgment of the most sensitive kind" [*Roth* v. *United States,* 354 U. S. at pp. 497-498; *Jacobellis* v. *Ohio,* 378 U. S. at p. 188]. Combining these factors, courts have characterized obscenity as a mixed question of fact and constitutional law [*People* v. *Richmond County News,* 9 N. Y. 2d 578, 580-581 (1961)].

Petitioner contends, in essence, that because of the special constitutional protection of "speech," a seller's foreknowledge must cover both fact and law, and that he escapes culpability unless he is aware that the material he deals in would be classified obscene by a court. In the absence of a prior restraint upon the particular item, this would necessarily call for an assessment of the outcome of an adjudication all but impossible for even the most trained and knowledgeable lawyers to make.

But beyond this, such a conclusion is a logically indefensible as well as practically unenforceable criterion of culpability. Guilt cannot depend upon the putative offender's own appraisal of the legal significance of his conduct. Else a man could acquit himself by his own belief in

his innocence. "Rational grounds" for such belief, in most cases, abound. And, while obscenity is separated from constitutionally protected speech by a thin line, its limits require effective enforcement opportunities nonetheless. *Scienter* requirements must not be so broad as to allow the line to be covered over by self-serving protestation.

> "Accordingly, the proof of scienter that is required to make prosecutions for obscenity cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity" [*Smith* v. *California*, 361 U. S. at p. 164, opinion of Justice FRANKFURTER].

Yet, admittedly, limiting knowledge to the facts alone may present a real dilemma for a distributor, for he may know the contents of a work, but not know it is obscene. Indeed, even after honest and good faith appraisal, he may still be liable to conviction if a court later disagrees, despite the fact that he intends to commit no crime by dissemination. Thus a man may not know he is a criminal until he is convicted, an outcome not immediately commending itself to common concepts of justice.

This consequence is traceable in good measure to the operation of the criminal law, which is confined to a *post facto* review of conduct. The practicalities of crime and enforcement do not lend themselves to prior advisory opinions. Consequently, a defendant is thrown upon his own resources to assess his conduct, and by choosing to act he must assume the risks if he is wrong.

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree" [*Nash* v. *United States*, 229 U. S. 373, 377 (1912)].

In *Smith* this Court expressed concern that forcing a distributor to run this risk might result in self-censorship producing an inhibitory effect on the dissemination of non-obscene material. While, as the Court also recognized, any form of criminal obscenity statute will inevitably have some such effect, the tendency to inhibit should substantially diminish as the character of the material recedes from the area of protected speech. Viewed in another light, this concern is actually induced by the necessarily blurred definition of obscenity at the borderline, another aspect of the issue of vagueness. In an effort to harmonize a man's before-the-fact assessment of his conduct, and the legal system's after-the-fact review, criminal statutes require "sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice" [*Roth* v. *United States*, 354 U. S. at p. 491, *supra*]. Conversely, a statute is not void for vagueness by failing to define consequences with mathematical precision and certainty. For realistically, a residuum of doubt inevitably and unavoidably shrouds borderline conduct.

Realizing, however, that obscenity appraisals are extremely difficult in borderline situations, this Court left open in *Smith* "whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse" [361 U. S. at p. 154]. This "justification" is the nexus of Redrup's *scienter* defense, for appellant argues that he did not honestly believe the two books were obscene. He cites in support his statement to the police officer that *Lust Pool* and *Shame Agent* were no worse than "girlie" magazines also displayed for sale at the newsstand.

Nevertheless, while this claim is superficially appealing, appellant misconstrues the meaning of "honest mistake," for that defense, insofar as it should be available, cannot refer to the mistake of law which Redrup made, but must describe a mistake in factual evaluation. Certainly in *Ginzburg* v. *United States* [383 U. S. 463 (1966)] the defendant believed that his material was protected by prior Supreme Court rulings; he said so specifically in the advertisements which this Court accepted at face value [*id.* at p. 468, text and footnote 9]. Ginzburg's belief, while both honest and mistaken, did not prevent his conviction, for he knew precisely the contents of his publications. Indeed, his salacious descriptions contributed to their pornographic character.

Even more closely analogous to the case at bar is the decision of the Sixth Circuit in *United States* v. *Oakley* [290 F. 2d 517 (6th Cir. 1961)]. Rejecting a *scienter* claim founded upon the defendant's personal comparison of the obscene material he mailed with non-obscene matter currently available in the community, the court reasoned:

> "Should defendant be held to have meant no wrong? Defendant told of pictures seen by him while in the service. He introduced numerous publications and made reference to other media of information and entertainment currently available to the view of the public. He argues that his material was no worse than these. From his experience with these matters, he was persuaded, he says, that his enterprise was not illegal, and criminal intent was absent. We need not here pass upon the relative merits, or demerits, of defendant's wares and what may be obtained elsewhere. We decline to hold that contemporary sophistication has

reached a point whereby to provide this defendant, or anyone else, with a license to prosecute the business of disseminating obscenity'' [290 F. 2d at p. 519].

Indeed, to permit an honest mistake as to the legal significance of material to control the judgment of a court is hardly different from resting the verdict upon the defendant's belief as to obscenity. Perhaps a theoretical distinction can be drawn but the line would certainly be erased in practice. An uncertain distributor could merely consult an attorney who would probably be uncertain also. Could the attorney's indecision then provide a seller of pornography with a complete defense against prosecution? Or could an attorney in collusion with the distributor immunize him by a slight pull of the bootstraps? With these and other anomalies, dangers and subterfuges undoubtedly in mind, the Circuit Court in *Schindler* v. *United States* [208 F. 2d 289 (9th Cir. 1953)] properly refused to receive evidence that a distributor was advised by his lawyer that dissemination of the material later deemed obscene in court was lawful.

In brief, to require proof that the defendant made no honest mistake in his legal appraisal of the material he sold makes little sense. On the other hand, it is entirely reasonable that a seller, acting in good faith, should be exonerated if an honest mistake prevented him from learning the facts about the character or content of his material. For he is then without the necessary basis upon which he can choose a course of action, and his failure to obtain the facts is excusable, much as a child's age or an insane man's mind inhibits rational choice.

In this regard, Justice FRANKFURTER, concurring in *Smith*, aptly observed that "the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut" [361 U. S. at p. 161]. For to purposefully refuse to learn the facts is not a good faith act, and thus cannot be the basis of an honest claim of ignorance. But "obviously," the Justice continued, "the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop" [*ibid.*]. How then is one to decide which publications must be examined, and which can be freely disseminated without further inquiry? There exist certain books which, because of their titles, cover drawings, cover "blurbs," exorbitant prices or unusual method of delivery, to name a few of the more common indicia, signal their pornographic character. Such clues put the seller on notice that the books may be obscene, and if he fails to take cognizance of the obvious, his negligence deprives him of a defense based on good faith ignorance.

However, it is entirely possible that a pornographic text does not flaunt its character openly. The *Memoirs of a Woman of Pleasure* suggestively advertised differs importantly from *Fanny Hill* sedately dressed [see, *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966)]. The seller might then reasonably mistake the volume for an innocent publication. He has little or no notice of the possible obscene nature of the text, and cannot be expected to make further inspection. In short, he will have no knowledge of the book's story, and there will be no particular reason for him to know about it. If he makes a mistake under such conditions, the error is understandable and he is deserving of acquittal for lack of *scienter*.

The facts of the instant case, notwithstanding the petitioner's argument, clearly evidence Redrup's knowledge of the facts sufficiently to satisfy the element of *scienter*. Although he was merely "filling in" for an hour in place of the regular clerk at the time of his arrest, the defendant had been employed in the store for a period of two years and had previously been stationed in that part of the store where the articles in question were displayed and sold. While the defendant may not have read the books in question, or been responsible for their inclusion in the store's inventory, there is little doubt upon this record that he was familiar with their contents. Their titles, *Lust Pool* and *Shame Agent*, obscure publisher, "Corinth Publications," and cover "blurbs" ("they spent a summer of sin beside this LUST POOL," and "He sold public relations—by the sinload!")* all unmistakeably denoted the genre of the writing within. Such "pulp" sex novels are commonplace and anyone working for two years in a bookstore in the Forty-second Street area of Manhattan could hardly escape some acquaintance with this sort of publication. They are virtually interchangeable, varying only in their story lines which serve to connect stereotyped sexual episodes. Indeed, the defendant admitted some knowledge of the contents of the books in question

* Printed on the outside of the back cover of *Lust Pool*, the following appears, here reproduced in full:

> "TOO MANY WOMEN! Too many loves. Everywhere Marshall Jones turns he finds another shameless minx, arms held wide, welcoming him to share her most depraved hungers. They find him from humble bars to palatial mansions * * * from gaudy sin dens called strip joints to the most degrading workshops of professional hustlers. And Big Tom, the vice lord, owns them all, lock, stock, and loving * * * only Marshall Jones proved to be too much to keep in the lust pool * * *."

when he compared them to "girlie" magazines also displayed for sale in the premises. Such awareness of the facts as would permit the undenied comparison he made for the officer, constitutes *scienter* and negates the claim of "honest mistake" as that term is properly understood.

Finally, if wisdom decrees that liability should be excused by a true error of judgment concerning the pornographic character of the work, such a uniquely wrought exemption should not be forced within the bounds of *scienter*. The old familiar concept of *scienter* must remain simply knowledge of the facts, an unsophisticated creature. And *Smith* must be taken to enjoin upon the prosecution only the burden of proof of such knowledge, a burden which is reasonable, as well as just, to demand. The creation of such a special excuse, then, is no federal concern. If a state should choose—perhaps wisely—to excuse from liability in this sensitive and difficult area the man who is honestly mistaken in his good faith effort to judge the pornographic character of a piece, it might be appropriate to create an "affirmative defense" for the purpose. As an affirmative defense, the burden would be upon the defendant to establish both his state of mind and the considerations leading to his belief, matters particularly within his ability to prove, as they are beyond the state's capacity to disprove.

The State of New York has quite recently accepted the principle of the affirmative defense as a burden of the defendant. In the Revised Penal Law, enacted last year effective September 1, 1967, the new defense has been used, sparingly, for such special excuses peculiarly stemming

from the defendant's own state of mind and consequently within his ability to prove. Thus, for example, in an obscenity case it is an affirmative defense that the audience had a scientific or similar reason for viewing the material (Rev. Penal L., §235.15). In a larceny prosecution, the defense is available to show that the property was appropriated under a good faith claim of right (*id.* §155.15). [The affirmative defense is defined in Section 25.00 (2) of the Revised Penal Law.]

The policy of the jurisdiction affected, not the Constitution, must approve the wisdom of providing the sort of excuse urged here by the amicus, and decide the most appropriate way of incorporating it into existing law. Whether the evil of self-censorship will be diminished, while preserving the ability to enforce obscenity laws is a question for local resolution. The constitutional mandate of free dissemination of ideas is satisfied by requiring the state to prove that the accused bookseller was not ignorant of the facts upon which his liability is predicated.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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September, 1966